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Corbin R. Davis,
Supreme Court Clerk
Lansing, MI 48909

Re: ADM File No. 2011-05

These Comments are submitted on behalf of the Grievance Administrator. Overall, it is recommended that, in lieu of some of the proposed changes, certain of the ABA Model Rules be adopted. In place of Michigan Rules of Professional Conduct (MRPC) 1.1 – 1.4, it is recommended that the ABA Model Rules 1.1-1.4, with the commentary, be adopted by the Court. It is further recommended that the Court consider adopting ABA Model Rules 4.1 and 1.18. Specific comments are, as follows:

1. MRPC 1.1: The proposed addition is:

"If a lawyer provides legal advice or legal assistance in an emergency, the assistance should be limited to that reasonably necessary in the circumstances."

Placing this language in the black letter portion of the rule is redundant and confusing. MRPC 1.1(b) requires that a lawyer refrain from handling a legal matter without preparation "under the circumstances," which clearly requires that consideration by given to the existing circumstances when evaluating whether an attorney has provided competent representation.

2. MRPC 1.2: The proposed addition is to add a new rule MRPC 1.2(b):

"A lawyer shall assume responsibility for technical and legal tactical issues, but should defer to the client about matters that do not directly pertain to the case, such as expenses to be incurred or concerns the client may express regarding third parties who may be affected adversely."

Rather than the proposed change to MRPC 1.2, it is recommended that the Rule 1.2 of the ABA Model Rules[1] be adopted to entirely replace MRPC 1.2. Model Rule 1.2 has appropriate references to considerations of communication under Rule 1.4. Further, the proposed rule should specify that any limitation of authority be must be reasonable under the circumstances. An inappropriate limitation may occur if circumstances beyond that of costs are ignored in the decision-making process. Also, a reference to the proposed rule under 1.5(b) may be appropriate given that the two proposed rules discuss similar issues of cost incursion.

3. MRPC 1.3: The proposed addition is to add language to 1.3:

"A lawyer shall act with reasonable diligence and promptness in representing a client, including providing clarification, preferably in writing, about when and whether a client-lawyer relationship exists."

The proposed addition is not properly placed into Rule 1.3 and is clearly redundant to language contained in Rule 1.5(b). Redundancy creates confusion and uncertainty. The proposed change is unnecessary and confusing.

4. MRPC 1.4(c): The proposed addition is to add a new rule 1.4(c):

"A lawyer may not withhold information from the client to serve the lawyer's own interest or convenience."

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[1] ABA Model Rule:

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

It is recommended that the proposed language rule: "A lawyer may not withhold information from the client ***relevant to the representation*** to serve the lawyer's personal interests or those ***of another client of the lawyer.***" This language would coordinate with a lawyer's duty to eschew concurrent conflicts found in Rule 1.7; a reference to Rule 1.7 may also be appropriate.

5. MRPC 1.5(b): The proposed addition is to add new rule 1.5(b):

"**(b) A lawyer shall not enter into an agreement that may induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. A lawyer shall not perform the lawyer's duties using inefficient or wasteful procedures in order to exploit a fee arrangement.**"

The proposed language may affect "scope of the representation" as found under Rule 1.2(a). Cross-references to Rule 1.2(a) would be appropriate. Additionally, it may be appropriate to cross-reference in the commentary an attorney's duties under MRPC 3.1(frivolous litigation) and 3.2(expediting litigation)

6. MRPC 1.6: The proposed additions are:

(b)(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure. Except as otherwise provided in Rule 1.6, a lawyer is prohibited from disclosing a client's confidences after the lawyer's withdrawal from representing the client."; and,

(c)(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct. However, disclosure under this provision should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, and disclosure should be made in a manner that limits access to the information to the tribunal or other persons who need to know it.

The proposed change to Rule 1.6(b)(3) has unintended consequences of conflicting with other rules. For example and without limitation, when a lawyer knows that a client intends to commit perjury, he or she has duties toward the tribunal under Rule 3.3 to take remedial measures.. In order to avoid this unintended consequences, it is recommended that the Court employ the language of the ABA Model Rule 1.6 (5)and(6)[2] in place of the proposed language.

[2](b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding

7. MRPC 1.7: The proposed additions are:

"(c)(2)A lawyer shall not allow the lawyer's business interests to affect the lawyer's representation of a client; and,

(d)A lawyer shall not represent multiple defendants in a criminal case unless the risk of adverse effect is minimal and the requirements of paragraph (b) are met."

The proposed change to the language of Rule 1.7(c)(2), may affect or be affected by the specific conflicts rule. For example Rule 1.8(a) allows a lawyer to enter into business transactions with a client with certain, specified safeguards. Under 1.8(b), a lawyer "shall not use information relating to representation of a client to the disadvantage of the client **unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3**." (Emphasis added). The language of both these rules is somewhat in conflict with the proposed change to Rule 1.7(c)(2).

8. MRPC 1.9: The proposed additions are:

"**(c)If a person seeks to disqualify a lawyer on the basis of an alleged violation of paragraph (b), the burden of proof rests on the lawyer whose disqualification is sought"; and,**

"(e) If a lawyer moves from one firm to another and is subsequently subject to a motion for disqualification on the basis of imputed or vicarious disqualification as a result of the move, determination of the claim of disqualification should be made by evaluating the functions of preservation of confidentiality and avoidance of positions adverse to the client."

The proposed changes to MRPC 1.9 (c) and (e) are better placed into Chapter 2.100, perhaps MCR 2.117 which applies to appearances by attorneys. Strictly speaking, the proposed changes discuss evidentiary burdens and are not a rule of conduct by a lawyer.

9. MRPC 1.13: The proposed additions are:

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concerning the lawyer's representation of the client; or

(b)(6) to comply with other law or a court order.

> **"(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents. When officers or employees of the organization make decisions, the decisions ordinarily must be accepted by the lawyer even if the lawyer doubts the utility or prudence of the decisions; and,**
>
> **(b) The duties of a lawyer that are defined in this rule apply to a client that is a governmental organization. Because public business is involved, it may be there is a different balance that should be considered between the duty to maintain confidentiality and the duty to assure that a wrongful act is prevented or rectified."**

In place of the proposed language, it is recommended that the Court adopt ABA Model Rule 1.13[3]. After the Enron scandal, Congress enacted the Sarbanes-Oxley

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[3] **Rule 1.13 Organization As Client**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is

Act[4] which applies to publicly traded corporations. The ABA then amended Model Rule 1.13 to conform to the requirements of federal law. Essentially, Sarbanes-Oxley requires lawyers to report up the "chain of command." The Model Rule version also allows lawyers to reveal information outside of the organization regarding violations by the organization if the lawyer reasonably believes is necessary to prevent substantial injury to the organization.

10. MRPC 1.15: The proposed language is, as follows:

"(g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred. A lawyer shall not delay remittance of funds received from third persons as a way to coerce a client to accept a lawyer's statement of payable fees and expenses."

The proposed added language to Rule 1.15(g) is redundant to Rule 1.15(b)(3)[5] and Rule 1.15(c)[6]. It is recommended instead that the Court consider amending 1.15(g) to require that lawyers send a billing statement to a client before withdrawing fees or costs: "Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred **and after the client is notified of the**

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informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[4] The Sarbanes–Oxley Act of 2002, §307 (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002) requires that attorney, including in-house attorneys, "evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

[5] 1.15(b)A lawyer shall (3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

[6] (c) When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

withdrawal." This suggested language would clarify the timing of withdrawals and benefit clients by ensuring that they are sent timely notice of the fees and costs that are being incurred. Further, clients would be provided an opportunity to make timely objection before withdrawals are made.

11. MRPC 1.16: The proposed language is, as follows:

(a) A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion....;

(c) ... If the client is mentally incompetent and wishes to discharge his lawyer, the lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

(d) Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

The proposed revision to 1.16(a) is appropriate and makes clear that lawyers must give consideration to factors beyond obtaining a fee in accepting a representation.

For organizational purposed, the proposed revision to 1.16(c) would be better placed under MRPC 1.14, which is the rule specific to attorneys dealing with disabled clients. At the least, the rules should contain cross-references to 1.14 and the proposed addition to 1.16(c). The proposed addition to 1.16(d) appears redundant to the standard already set forth in the rule.

12. MRPC 1.17: The proposed language is, as follows:

"(a) .... A lawyer participating in the sale of a law practice is subject to the ethical standards that apply when involving another lawyer in the representation of a client. These include, for example, the seller's obligation to act competently in identifying a purchaser qualified to assume the representation of the client and the purchaser's obligation to undertake the representation competently, MRPC 1.1, the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts that can be waived, MRPC 1.7, and the obligation to protect information relating to the representation, MRPC 1.6 and 1.9. A seller may agree to transfer matters in one legal field to one purchaser, while transferring

matters in another legal field to a separate purchaser. However, a lawyer may not sell individual files piecemeal."

The proposed revision to 1.17(a) is appropriate and makes clear that lawyers must give consideration to ethical standards when selling a law practice.

13. MRPC 3.2: The proposed language is, as follows:

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."

The second sentence of the proposed revision should not be included because the phrase "or other benefit" negates the language in the first sentence. Some delay may be necessary, such as to await a change in the law or to investigate. Simply stated, the phrase "or other benefit" is too vague and becomes the exception that swallows the rule.

14. MRPC 4.1: The proposed language is, as follows:

"... A false statement may include the failure to make a statement in circumstances in which silence is equivalent to making a statement."

The proposed amendment is appropriate and makes clear that a lie by omission is also a misrepresentation. It is recommended that the Court also consider including language from ABA Model Rule 4.1(b)[7] for mandatory disclosure by a lawyer of a client's concurrent or future crime or fraud when that lawyer's services have been used in connection with that crime or fraud.

15. MRPC 5.2: The proposed language is, as follows:

"b) When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in

[7] (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

The proposed language should not be adopted because it would completely vitiate the separate duty of a subordinate attorney to exercise independent judgment over his or her professional responsibilities. Upon admission to the practice of law all lawyers are presumed to know their ethical duties. Under current rules, if the ethical duty is unclear then, and only then, may a supervising attorney assume responsibility for making the judgment. The proposed change completely insulates subordinates from having to exercise their own ethical judgment.

15. MRPC 8.4: The proposed language is, as follows:

(b) A lawyer who holds public office assumes legal responsibilities beyond those of nonlawyer citizens."

The proposed language is too vague and is language that appears to be more aspirational than substantive. The rule does not contain standards or an indication of what additional legal responsibilities are being referenced. It is recommended that the proposed change not be adopted.

Thank you.

Sincerely,

Cynthia C. Bullington,
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Michigan Attorney Grievance Commission